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NOTICE OF *EX PARTE* PRESENTATION

October 1, 2003

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWA325
Washington, DC 20554

Re: Telephone Number Portability, CC Docket No. 95-116

Dear Ms. Dortch:

The attached written *Ex Parte* Presentation concerning the above-referenced proceeding was sent to the Wireline Competition Bureau Chief William Maher and Wireless Telecommunications Bureau Chief John Muleta, with copies to those identified on the Presentation, by the undersigned on October 1, 2003, on behalf of the United States Telecom Association (USTA). In accordance with FCC Rule 1.1206(b)(1),¹ this Notice of *Ex Parte* Presentation and a copy of the *Ex Parte* Presentation are being filed with you electronically for inclusion in the public record. Should you have any questions, please feel free to contact me at (202) 326-7300.

Sincerely,

Michael T McMenamin
Associate Counsel

Attachment

cc	William Maher	Cheryl Callahan
	John Muleta	Jared Carlson
	Matthew Brill	Pam Slipakoff
	Jessica Rosenworcel	Scott Mackoul
	Daniel Gonzalez	Jennifer Tomchin
	Christopher Libertelli	Patrick Foster
	Lisa Zaina	Diane Griffin
	Kathleen Ham	Jennifer Salhus
	Simon Wilkie	

¹ 47 C.F.R. §1.1206(b)(1).



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October 1, 2003

EX PARTE PRESENTATION
Via e-mail

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW, Room 5 C450
Washington, DC 20554

John Muleta
Chief, Wireless Telecommunications Bureau
445 12th Street, SW
Washington, DC 20554

Re: Telephone Number Portability, CC Docket No. 95-116

Gentlemen:

Since the Cellular Telecommunications and Internet Association's (CTIA) initiation of this proceeding via its petitions for declaratory ruling (Petitions),² several *Ex Parte* presentations have been made to which the United States Telecom Association (USTA) hereby responds. Many of these presentations urge the Federal Communications Commission (FCC/Commission) to render relief in the above docket without the benefit of a rulemaking proceeding, where all interested parties are put on notice of the FCC's proposed actions and a complete record can be developed. The FCC should reject these requests because the issues brought forth in CTIA's Petitions cannot be lawfully resolved via a declaratory ruling.

CTIA's Petitions' seek expansion of the current inter-modal number porting obligations between wireline and wireless carriers. Specifically, CTIA seeks to compel number porting outside of the rate centers of wireline carriers and shorten the porting interval³ in which wireline carriers' port numbers. Changes to the geographic scope of the porting obligation for wireline carriers and decreasing the wireline porting interval require a rulemaking proceeding.

² See Telephone Number Portability, CC Docket No. 95-116, *Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association* (filed Jan. 23, 2003)(January 23, 2003 Petition); *Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association*, (filed May 13, 2003)(May 13, 2003 Petition).

³ When a customer changes providers and wishes to keep the same phone number, the number must be ported to the new provider. The porting interval is the amount of time it takes for the two providers to complete the process of porting the customer's number.

USTA believes that a rulemaking is required in order to change an existing rule. Further, a rulemaking proceeding better enables the FCC to adequately examine the issues, which will require the creation of a concrete record in order that cost, efficiency, administrative simplicity and impacts on intrastate rate structures administered by state public service commissions are taken into account. For the FCC to change the number porting obligations of wireline carriers without a rulemaking would constitute error of law.

Section 52.26(a) Incorporates the NANC's Determinations

Pursuant to the North American Numbering Council (NANC) Architecture and Administrative Plan for Local Number Portability, number "portability is technically limited to the rate center/rate district boundaries of the incumbent local exchange carriers (ILEC) due to rating and routing concerns."⁴

The fundamental difference between wireline and wireless service is: Wireline service is fixed to a specific location. The NPA-NXX of the subscriber's telephone number is associated with a specific geographic rate center, and the subscriber's service must be sited within that rate center's geography. Wireless service is mobile and not fixed to a specific location. While the wireless subscriber's NPA-NXX is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center. Consequently, if a wireless subscriber's NPA-NXX is outside of the wireline rate center where they wish to port they will not be able to port their number.⁵

Likewise, the NANC addressed the time limit that wireline carriers must abide by when telephone numbers need to be ported after a porting order is placed.

After the Firm Order Commitment (FOC) is received by the new Service Provider (SP), both old and new SPs send subscription records to the NPAC which must include the FOC due date. The FOC due date will be no earlier than three (3) business days after the FOC receipt date. No NPAC subscription version may activate before the FOC due date unless a new FOC is negotiated with the old SP."⁶

The NANC recommendations were incorporated by reference and adopted by the FCC in section 52.26(a) of the Commission's rules. Section 52.26(a) states:

Local number portability administration shall comply with the recommendations of the North American Numbering Council (NANC) as set

⁴ *North American Numbering Council Local Number Portability Administration Selection Working Group Final Report and Recommendation to the FCC*, Appendix D at 5 (§ 7.3) (April 25, 1997)(Final Report).

⁵ *North American Numbering Council Local Number Portability Administration Working Group on Wireless Wireline Integration*, Section 3.1 (May 8, 1998).

⁶ Final Report at Ex. E at A1.

forth in the report to the Commission prepared by the NANC's Local Number Portability Administration Selection Working Group. Dated April 25, 1997 (Working Group Report) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. Except that: Section 7.10 of Appendix D of the Working Group Report is not incorporated herein.⁷

Thus, the Commission's rules require wireline carriers to port numbers to CMRS providers within the boundary of the wireline rate center. Moreover, wireline carriers are to port numbers within three (3) business days after the FOC receipt date.

What Is The Relief That CTIA's Petitions' Request

In its Petitions', CTIA claims to seek only an affirmation or clarification of the existing law. CTIA "requests that the Commission issue a declaratory ruling that wireline carriers have an obligation to port their customers' telephone numbers to a CMRS provider whose service area overlaps the wireline carrier's rate center"⁸ CTIA also requests that the "Commission clarify the duties of both wireless and wireline carriers" as to the disparate porting intervals of wireline and wireless carriers.⁹ However, CTIA goes on to state that "[t]he key issue, well recognized for years, is whether the wireline rate center has any relevance for wireless number portability." In addition, CTIA states that the disparate porting interval between wireline and wireless carriers must be resolved before inter-modal porting can occur. CTIA premises its arguments on purported clarifications of existing law and then expounds at length about the disparate regulatory environment between wireline and wireless providers and its implications upon inter-modal portability. Even after careful review of the petitions, parties to this proceeding are left in a quandary as to the breadth of the changed obligation that CTIA would have the FCC impose upon wireline carriers. This confusion underscores the importance of effectuating any changes to wireline carrier number porting obligations through a rulemaking proceeding so all interested parties can have a common understanding of the proposed rule changes.

The declaratory ruling proceeding allowed for public comment. It is not the public comment aspect that distinguishes the rulemaking from the declaratory ruling. Rather, the Administrative Procedure Act (APA) requires that the FCC institute a rulemaking proceeding in order to change the rules prescribing wireline carrier porting obligations.

The APA Requires The FCC To Institute A Rulemaking Proceeding

A Commission rule may not be changed via a declaratory ruling. Rules can only be changed through the process set forth in section 553 of the APA.¹⁰ "Underlying these principles is a distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied

⁷ 47 CFR § 52.26.

⁸ January 23, 2003 Petition at 1.

⁹ May 13, 2003 Petition at 6. CTIA states that "CMRS carriers established a goal of processing ports within two and one half hours in order to mirror current wireless business practices with the expectation that wireless-to-wireless ports will be completed within one business day." *Id.* at 7.

¹⁰ 5 U.S.C. § 553(c).

in an interpretive rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the APA's procedures."¹¹ Any change to the Commission's rules must adhere to the rulemaking standards of the APA and if not, will be set aside.¹²

CTIA Petitions' seek "new rules that work substantive changes" to a wireline carrier's local calling area and porting interval. Any changes to the Commission's rules must be "subject to the APA's procedures." The FCC can not change the wireline porting boundary or interval as set forth under 47 CFR § 52.26(a) via a declaratory ruling proceeding, but rather must institute a rulemaking proceeding in conformance with the APA. Thus, the FCC should dismiss CTIA's Petitions' and institute a rulemaking proceeding in conformance with the APA on the issues set forth herein.

Sincerely,



Michael T McMenamain
Associate Counsel

Attachment

cc	William Maher	Cheryl Callahan
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¹¹ See *Sprint v. FCC*, 315 F.3d 369, 371 (D.C. Cir. 2003)(citing *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)).

¹² *Id.*